

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MANZOOR BEVINAL, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

AVON PRODUCTS, INC., SHERILYN S.
McCOY, JAMES S. WILSON and JAMES S.
SCULLY,

Defendants.

Case No.: 1:19-cv-01420-CM

Hon. Colleen McMahon

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
CONSENT MOTION TO AMEND CAPTION AND REFILE COMPLAINT**

Lead plaintiff Holly Ngo ("Lead Plaintiff") and additionally named plaintiff David Klungle (together, "Plaintiffs") respectfully submit this memorandum of law in support of their motion ("Motion") for an order amending the caption in this action and granting them leave to refile their first amended complaint (D.I. 25, "FAC").

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Manzoor Bevinal ("Bevinal") commenced the first filed action against defendants Avon Products, Inc. ("Avon"), Sherilyn S. McCoy ("McCoy"), James S. Wilson ("Wilson"), and James S. Scully ("Scully") on February 14, 2019. D.I. 1. On that same day, counsel acting on Bevinal's behalf published a notice on *Business Wire* announcing that a securities class action had been initiated against the above-captioned Defendants. *See* Exhibit C to the Declaration of Eduard Korsinsky (D.I. 14); 15 U.S.C. § 78u-4(a)(3)(A)(i). Lead Plaintiff timely moved for appointment as Lead Plaintiff (*see* D.I. 12-14) and on June 3, 2019, the Court appointed Lead Plaintiff pursuant to the terms of the Private Securities Litigation Reform Act of 1995. (D.I. 16, "June 3, 2019 Order").

On June 17, 2019, the Court directed Lead Plaintiff to file her FAC on or before June 28,

2019. (D.I. 24). Plaintiffs timely filed the FAC on June 28, 2019, in which they named themselves as Plaintiffs and added David Legher (“Legher” and, together with Avon, McCoy, Wilson, and Scully, “Defendants”) as a defendant. FAC ¶¶ 28, 33. On July 1, 2019, the Clerk’s Office of the Southern District of New York (“Court’s Office”) entered the following notice to the electronic docket:

***NOTICE TO ATTORNEY REGARDING DEFICIENT PLEADING. Notice to Attorney Christopher James Kupka to RE-FILE re: Document No. [25] Amended Complaint,. The filing is deficient for the following reason(s): the wrong filer/filers were selected for the pleading; the selected filers do not appear on the pleading caption; the pleading was filed incorrectly on the due date of 6/28/2019 set by the court, therefore Court's leave will be required to re-file. Re-file the pleading using the event type Amended Complaint found under the event list Complaints and Other Initiating Documents - attach the correct signed PDF - select the individually named filer/filers - select the individually named party/parties the pleading is against. File the Exhibit to Pleading event found under the event list Other Documents and attach either opposing party's written consent or Court's leave. (pne)

See Declaration of Christopher J. Kupka (“Kupka Decl.”) ¶ 3. Later that day, Plaintiffs’ counsel contacted counsel appearing on behalf of the defendants, and on July 2, 2019 such counsel consented in writing to the requested amendment of the caption and refiling. *Id.* ¶ 4.

II. ARGUMENT

A. Amendment of the Caption and Refiling of the FAC Is Appropriate.

“Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation.” FED. R. CIV. P. 10(a). However—as the Second Circuit has observed—leave of Court is required to amend a caption:

A caption may of course be amended *with the permission of the court*. See Fed.R.Civ.P. 15. “Courts generally will allow an amendment under Rule 15 to correct technical defects in the caption.” 5 C. Wright & A. Miller, Federal Practice & Procedure § 1321, at 461 (1969). If permission is not given, the caption should be shown in compliance with Fed.R.Civ.P. 10(a).

Hernandez-Avila v. Averill, 725 F.2d 25, 27 n.4 (2d Cir. 1984) (emphasis added). On July 1, 2019, the Clerk’s Office entered a notice directing Plaintiffs’ counsel to refile the FAC because, purportedly, “the wrong filer/filers were selected for the pleading” and “the selected filers do not appear on the pleading caption”. Kupka Decl. ¶ 3. With respect to the former contention, Plaintiffs respectfully submit that the Clerk’s Office is mistaken, as the docket entry for the FAC clearly reflects that the “[d]ocument [was] filed by Holly Ngo, David Klungle”. *Id.* ¶ 2. With respect to the latter contention, the selected filers did not appear on the pleading caption because the Court’s June 3, 2019 Order did not direct that the caption be modified to include additional plaintiff(s). D.I. 16. Accordingly, Plaintiffs did not include themselves within the caption.

In order to comply with the Clerk’s Office’s directive, Plaintiffs make the instant Motion so that they may refile the FAC once the Court has directed that the Caption be modified. Plaintiffs propose that the modified caption read as follows:

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Counsel appearing on behalf of the defendants have provided consent, in writing, to the requested amendment of the caption and refiling. Kupka Decl. ¶ 4; FED. R. CIV. P. 15(a)(2) (allowing amendment of pleading “with the opposing party’s written consent or the court’s leave” and providing that courts “should freely give leave when justice so requires”). Plaintiffs respectfully submit that, because Plaintiffs are not proposing any modification to the FAC other than the caption and as a result there can be no prejudice to any party, justice requires that the Court direct that the caption be amended and grant Plaintiffs leave to file a revised FAC.

III. CONCLUSION

For the foregoing reasons, Movant respectfully requests that the Court grant their Motion.

Dated: July 2, 2019

Respectfully Submitted,

LEVI & KORSINSKY, LLP

/s/ Christopher J. Kupka _____

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